

FEDERAL CIRCUIT COURT OF AUSTRALIA

RANA v MINISTER FOR IMMIGRATION &
ANOR

[2016] FCCA 529

Catchwords:

MIGRATION – Administrative Appeals Tribunal.

PRACTICE & PROCEDURE – Show cause hearing pursuant to r.44.12 of the *Federal Circuit Court Rules 2001* (Cth) – no arguable case for the relief claimed – application dismissed.

Legislation:

Migration Act 1958 (Cth), ss.5, 5F, 359AA

Migration Regulations 1994 (Cth), reg.1.15A

Federal Circuit Court Rules 2001 (Cth), rr.44.12, 44.13

Cases Cited:

Abebe v Commonwealth of Australia (1999) 197 CLR 510

Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Ors (1996) 185 CLR 259

Minister for Immigration and Citizenship v SZNPG [2010] FCAFC 51

Applicant:

KIRTI RANA

First Respondent:

MINISTER FOR IMMIGRATION AND
BORDER PROTECTION

Second Respondent:

ADMINISTRATIVE APPEALS
TRIBUNAL

File Number:

SYG 2632 of 2015

Judgment of:

Judge Emmett

Hearing date:

11 March 2016

Date of Last Submission:

11 March 2016

Delivered at:

Sydney

Delivered on:

11 March 2016

REPRESENTATION

The applicant appeared in person with the assistance of a Punjabi interpreter.

Solicitor for the Respondents: Ms Chloe Hillary
(DLA Piper Australia)

**FEDERAL CIRCUIT
COURT OF AUSTRALIA AT
SYDNEY**

SYG 2632 of 2015

KIRTI RANA
Applicant

And

MINISTER FOR IMMIGRATION AND BORDER PROTECTION
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

EX TEMPORE

REASONS FOR JUDGMENT

1. On 24 September 2015, the applicant filed an application seeking judicial review of a decision of the Administrative Appeals Tribunal dated 8 September 2015 and handed down on 9 September 2015 (“**the Tribunal**”).
2. On 5 November 2015, the applicant attended a directions hearing before a Registrar of the Court. On that occasion, the applicant was given leave to file and serve an Amended Application giving complete particulars of each ground of review relied upon together with any further evidence by way of affidavit by 3 December 2015, and submissions in support by 4 December 2015.

3. The applicant was also provided with the contact details of legal service providers and translating and interpreting services in a document headed in the applicant's own language.
4. At the request of the first respondent, the matter was listed for today for a hearing pursuant to r.44.12 of the *Federal Circuit Court Rules 2001* (Cth) ("**the Rules**"), a copy of which was also given to the applicant.
5. Rule 44.12 of the Rules provides as follows:

"(1) At a hearing of an application for an order to show cause, the Court may:

(a) if it is not satisfied that the application has raised an arguable case for the relief claimed—dismiss the application; or

(b) if it is satisfied that the application has raised an arguable case for the relief claimed—adjourn the proceeding and order a respondent to show cause at a final hearing why an order for the relief claimed should not be made on such of the grounds mentioned in the application as are specified by the Court; or

(c) without making an order under paragraph (b), make final orders in relation to the claims for relief and grounds mentioned in the application.

(2) To avoid doubt, a dismissal under paragraph (1)(a) is interlocutory."

6. Relevantly, r.44.13 of the Rules provides:

"(1) At a hearing of an application for an order to show cause, the applicant is confined to the relief sought and the grounds mentioned in the application."

7. The first respondent, in written submissions, accurately summarised the background of the applicant's claims, the relevant legislation and the Tribunal's decision, as follows:

"Background

2. The applicant is a male citizen of India. He applied for a subclass 820 Partner (Temporary) (Class UK) visa on 23 May

2014 on the basis of his relationship with his sponsor, [name omitted].

3. It was a criterion for grant of the visa that the applicant be the spouse or de facto partner of the sponsor at the time of the visa application, pursuant to clause 820.211(2)(a) of schedule 2 of the Migration Regulations 1994 (Cth) (***the Regulations***).

4. It was a further criterion for grant of the visa that the applicant be the spouse or de facto partner of the sponsor at the time of decision, pursuant to clause 820.221(1)(a) of the Regulations (with limited exceptions which did not apply in this case, such as where the sponsor has died or the applicant claims to be the victim of family violence).

5. The terms 'spouse' and 'de facto' are defined in the [Migration Act 1958 (Cth) ("***the Act***")]. The applicant was legally married to the sponsor, and accordingly sought to satisfy the definition of 'spouse' which is found in section 5F of the Act:

Spouse

(1) For the purposes of this Act, a person is the ***spouse*** of another person if, under subsection (2), the 2 persons are in a married relationship.

(2) For the purposes of subsection (1), persons are in a ***married relationship*** if:

(a) they are married to each other under a marriage that is valid for the purposes of this Act; and

(b) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and

(c) the relationship between them is genuine and continuing; and

(d) they:

(i) live together; or

(ii) do not live separately and apart on a permanent basis.

(3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for

different purposes whether one or more of those conditions exist.

6. Regulation 1.15A sets out those factors which need to be considered when determining whether the definition of 'spouse' is satisfied, as provided for in section 5F(3). Regulation 1.15A provides as follows:

Spouse

(1) For subsection 5F(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F(2)(a), (b), (c) and (d) of the Act exist.

(2) If the Minister is considering an application for:

- (a) a Partner (Migrant) (Class BC) visa; or
- (b) a Partner (Provisional) (Class UF) visa; or
- (c) a Partner (Residence) (Class BS) visa; or
- (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

(3) The matters for subregulation (2) are:

- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and

- (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
- (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
- (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.

(4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

7. The applicant's Partner visa application was refused by a delegate of the first respondent on 25 May 2015. The applicant applied to the AAT for review of the delegate's decision on 11 June 2015.

8. The applicant appeared at a hearing before the AAT on 27 August 2015 to give evidence and present arguments. The AAT also received oral evidence from the sponsor, [name omitted] (the

sponsor's grandmother) and [name omitted] (a relative of the applicant).

8.1 On 26 August 2015 the applicant had called the AAT and advised that the sponsor had the flu and was coughing a lot and would not be able to attend the hearing. The AAT advised that it would defer the hearing if a medical certificate was provided. No medical certificate was provided and the hearing proceeded at the scheduled time.

9. The AAT made a decision on 8 September 2015, affirming the decision under review.

The decision of the Tribunal

10. The AAT identified the issue to be determined as being whether the applicant and his sponsoring spouse were in a genuine spousal relationship at the time of application and at the time of the decision, [15].

11. The AAT found the oral evidence of the applicant and the sponsor to be vague and hesitant, in particular in relation to when they began cohabitating. The AAT did not find them to be credible. The AAT also found the applicant's evidence regarding housing arrangements to be inconsistent with the witness, [name omitted], who is also the sponsor's grandmother and whom the parties live with. These inconsistencies were put to the applicant in accordance with section 359AA at the hearing, [17], [22] and [31].

12. The AAT found [the sponsor's] evidence to be ambiguous and evasive, and therefore placed limited weight on her evidence. [Name omitted], the applicant's cousin also gave supportive evidence at the hearing, but said that he seldom sees the parties together, [17].

13. The AAT found that the marriage between the applicant and his sponsor was a valid marriage for the purposes of the Act, as required by section 5F(2)(a), [20].

14. In assessing whether the parties met the definition of spouse, as required by section 5F, the AAT considered the factors set out in regulation 1.15A(3), as follows:

*14.1. **Financial aspects of the relationship:** The AAT was not prepared to accept on the basis of the evidence before it that the parties had ever pooled their financial resources or shared day to day household expenses. The AAT found that*

the financial aspects of the relationship were not consistent with the parties being in a genuine and continuing spousal relationship, [21] - [27].

14.2. Nature of the household: *The AAT accepted that the applicant stayed at [the sponsor's grantmother's] home with the sponsor on occasion. However the Tribunal was not prepared to accept that the applicant and his sponsor lived together at the [suburb omitted] address as claimed. The AAT found that the evidence presented as to the nature of the parties' household was not consistent with the applicant and his sponsor being in a genuine and continuing relationship, [28] - [34].*

14.3. Social aspects of the relationship: *The AAT took into account the evidence of the witnesses, but found it was insufficient to persuade the AAT that the parties were in a genuine and continuing spousal relationship. The AAT found on the basis of the supporting statements provided by members of the applicant's family in India that they were aware of the parties' relationship. The AAT therefore found that there was some social recognition of the relationship amongst the parties' immediate family members. The AAT found there was limited independent evidence to indicate that the parties hold themselves out as being in a married relationship to those in the broader community. The AAT did not accept that the parties planned or undertook joint social activities and found that the social aspects of the relationship were not consistent with the parties being in a genuine and continuing relationship, [35] - [41].*

14.4. Nature of the persons' commitment to each other: *The AAT found that there was little independent evidence of any commitment to the relationship by either party. The AAT was not prepared to accept that the applicant and his sponsor provided one another with emotional support or that they see the relationship as long term, [42] - [50].*

15. The AAT found that the applicant did not meet the definition of spouse, within the meaning of section 5F(2)(b)-(d), [51].”

8. The applicant was unrepresented before the Court this morning, although had the assistance of a Punjabi interpreter.
- 9.

10. At the outset of today's hearing, the applicant stated that he wished to obtain legal advice.
11. I understood from that statement that the applicant was requesting an adjournment of today's hearing to obtain legal advice. I asked the applicant if he had, in fact, instructed a lawyer or arranged for any appointment with a lawyer. The applicant responded that he had not made any such arrangement and that he wished to approach Legal Aid.
12. The applicant's application for an adjournment was opposed by the solicitor for the first respondent on the basis that the applicant has had sufficient time to seek any legal advice. The solicitor for the first respondent also submitted that there was no utility in granting an adjournment.
13. The contact information for Legal Aid was included in the document containing the details of legal services providers and translating and interpreting services, provided to the applicant at the directions hearing on 5 November 2015. In circumstances where the applicant has taken no steps to contact Legal Aid or to make any other arrangement to obtain any legal advice since the commencement of this matter on 24 September 2015, the applicant's application for an adjournment was refused.
14. The applicant then confirmed to the Court that he had not filed any further documents and that he relied on the ground contained in his initiating application for judicial review, filed on 24 September 2014, as follows:

"1. The member has failed to determine the evidence to comply legal test rather than member relied upon oral inconsistency to affirmed the department decision to refuse spouse visa there are huge amount of documented evidences which itself evidence of genuine and ongoing marriage. The member accepted the social aspects of the relationship which is imperative to be taken in to account and member of the both family support. The member made decision o[n] perception to ignore the evidence to apply proper legal test therefor[e] it was jurisdictional error failure to comply with the legal test."

(Errors in original.)

15. That ground was interpreted for the applicant and the applicant was invited to say whatever he wished to say in support.
16. The applicant did not have any submissions to make in support of his ground for judicial review, or in support the application generally.
17. The applicant's complaint in the ground of his application is difficult to discern.
18. **To the extent the ground appears to assert that the Tribunal failed to apply the proper legal test** in making its decision, the applicant did not make any written or oral submissions to identify in what way the Tribunal failed to apply the correct legal test.
19. **To the extent that the ground appears to assert that the Tribunal incorrectly relied on inconsistencies in the applicant's oral evidence** in affirming the decision under review, again, there is no particularisation of the findings of inconsistency upon which the applicant relies or written or oral submissions in support.
20. The Tribunal's decision record makes clear that the Tribunal referred to various inconsistencies that it found to exist in the applicant's evidence and put those inconsistencies to the applicant for comment in accordance with s.359AA of the Act. The Tribunal noted the applicant's explanations, however, found that those explanations were not sufficient to avail it of its concerns.
21. The Tribunal's findings in respect of the inconsistencies in the applicant's evidence and its finding that the applicant's explanations were insufficient to address its concerns would appear to be open to the Tribunal on the evidence and material before it and for the reasons it gave.
22. **To the extent that the ground appears to assert that the Tribunal ignored the applicant's evidence,** there were no further particulars or written or oral submissions as to what that evidence might be.
23. As stated above, the applicant confirmed to the Court this morning that he had not filed any documents in accordance with the directions made by the Court on 5 November 2015 and that he had no other documents to provide to the Court this morning. In the circumstances, the

applicant's complaint that the Tribunal ignored his evidence is no more than a bare assertion that does not disclose an error capable of review by this Court.

24. **To the extent that the first respondent, in its written submissions, has attempted to discern the possibility of other complaints,** I refer to those submissions and accept them in their entirety. They are as follows:

“21. The ground of review suggests that the AAT accepted the social aspects of the relationship, which misstates the findings of the AAT.

21.1 The AAT found that the members of the applicant's family in India were aware of the relationship, [39]. The AAT found there was some social recognition of the relationship amongst the parties' immediate family members, but found that there was limited independent evidence to indicate that the parties held themselves out as being in a married relationship to those in the broader community, [40]. The AAT concluded that the social aspects of the relationship were not consistent with the parties being in a genuine and continuing relationship, [41].

21.2 The AAT did not, as is suggested by the applicant, 'accept the social aspects of the relationship'. It is apparent from the AAT's conclusion at [41] that it was not satisfied that this factor weighed in the applicant's favour.

22. The ground of review otherwise asserts that the AAT applied the wrong legal test. No particulars are provided, and it is apparent from the remainder of the ground that this assertion rests upon a disagreement with the AAT's factual findings. This seeks impermissible merits review. The first respondent submits that the AAT did not apply the wrong legal test.

22.1 It is a requirement at the time of application (see clause 820.211) and at time of decision (see clause 820.221) that the applicant be the spouse of the sponsor, within the meaning of the Act.

22.2 Section 5(1) of the Act provides that spouse has the meaning given in section 5F. Section 5F is extracted above.

22.3 As correctly identified by the AAT at [19] section 5F provides that a person is the spouse of another where the

two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as husband and wife to the exclusion of all others, the relationship must be genuine and continuing and the couple must live together or not live separately and apart on a permanent basis, section 5F(2)(a)-(d). The AAT correctly applied this definition, see [51].

22.4 In considering these matters, pursuant to section 5F(3), the AAT was required to have regard to regulation 1.15A and the matters contained therein, which the AAT did.”

25. I accept the submission of the first respondent that the ground, properly understood, is more in the nature of a disagreement with the findings and conclusions of the Tribunal. Such a complaint invites merits review which this Court cannot undertake (see *Abebe v Commonwealth of Australia* (1999) 197 CLR 510 at 53-54 per Gleeson CJ and McHugh J; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang and Ors* (1996) 185 CLR 259 at 272 per Brennan CJ, Toohey, McHugh and Gummow JJ). The following was stated in *Minister for Immigration and Citizenship v SZNPG* [2010] FCAFC 51 at [20] per North, Lander and Katzmann JJ:

26. “It was not for the Federal Magistrate’s Court, nor for this Court, to review the merits of [the Tribunal’s] decision: Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259 at 272; Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611. A wrong finding of fact is not an error of law: Waterford v The Commonwealth (1987) 163 CLR 54 at 77. Unsound reasoning is not an error of law: Reg v The District Court; Ex parte White (1966) 116 CLR 644 at 654; Australian Broadcasting Tribunal v Bond (1990) 170 CLR 321 at 356.”

27. Accordingly, the applicant’s ground for judicial review does not raise an arguable case for the relief claimed.

28.

29. The Tribunal's findings would appear to be open to it on the evidence and material before it and for the reasons it gave. The Tribunal appeared to apply the correct law to the findings that it made in the making of its decision and the conduct of its review.

Conclusion

30. While I make no final decision as to whether or not the Tribunal's decision is affected by jurisdictional error, the applicant has not identified any error on the part of the Tribunal that is capable of establishing jurisdictional error and none is apparent on the face of the decision record. The Tribunal referred to the relevant law in affirming the decision under review.
31. In the circumstances, I am not satisfied that the application has raised an arguable case for the relief claimed. Accordingly, in the exercise of the Court's discretion under r.44.12(1) of the Rules and on the basis that the application does not raise an arguable case, the proceeding before this Court, commenced by way of application filed on 24 September 2015, should be dismissed pursuant to r.44.12(1)(a) of the Rules with costs.

I certify that the preceding twenty-eight (28) paragraphs are a true copy of the reasons for judgment of Judge Emmett

Date: 22 March 2016